

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Inquiry Concerning High-Speed Access to the |) | |
| Internet Over Cable and Other Facilities |) | GN Docket No. 00-185 |
| |) | |
| Appropriate Regulatory Treatment for Broadband |) | CS Docket No. 02-52 |
| Access to the Internet Over Cable Facilities |) | |

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation (“Cablevision”), by its attorneys, hereby submits these comments in response to the Commission’s Notice of Proposed Rulemaking^{1/} in the above-referenced proceeding. Cablevision supports the Commission’s findings in the Declaratory Ruling, as the Commission’s reliance on market forces has led to the rapid rollout of broadband services. As it assesses the next steps to assure continued success in broadband deployment, the Commission should consider that:

- The Commission’s deregulatory approach to cable modem service has been pivotal to the rapid deployment of broadband services, which are now available to over 70% of residential users and continue to be deployed at an unparalleled rate.
- Cablevision’s success in deploying high quality broadband service throughout its economically diverse service area demonstrates (i) the success of the Commission’s “hands-off” approach, (ii) that neither forced access nor local regulation is necessary to ensure the widespread availability of broadband service, and (iii) that imposition of such rules on this nascent technology would be counter productive.

^{1/} *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities; Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, CS Docket No. 02-52 (rel. March 15, 2002) (“*Notice*”).

INTRODUCTION AND SUMMARY

The Commission's hands-off regulatory policy toward cable Internet service has spurred widespread deployment of broadband services to all Americans. In this environment, Cablevision has deployed high-speed Internet services broadly to residential consumers in its service area. Cablevision's Optimum Online offering is the most highly penetrated high-speed cable modem service available, and is widely recognized for its quality, speed and outstanding customer service. The marketplace has driven this progress, and the Commission has wisely exercised restraint in imposing new regulations that would upset this dynamic market.

- **The Commission's "Hands-Off" Regulatory Policy Has Been A Resounding Success**

The Commission's decision to forebear from regulation has spawned significant benefits for consumers. The deregulatory climate has facilitated the provision of Internet access to residential consumers at speeds which, until recently, were available only to high-end business users for thousands of dollars each month. The marketplace likewise has facilitated investment in upgraded plant and broad deployment of high-speed service, including to previously underserved low-income consumers. This success is threatened by "forced access" requirements that would jeopardize investment and deployment. Substituting regulation for the dynamic commercial relationships forged by the marketplace will most likely embroil the Commission in an expanding quagmire of rulemakings and dispute resolutions over pricing, cost, separations, and related matters. The Commission should instead continue to allow consumer preferences and market

forces to determine the type of services and partnerships that take shape on cable broadband platforms.

- **The Commission Should Not Impose New Regulations Based Upon Flawed and Incomplete Notions of Parity**

The goal of Congress and the Commission is to accelerate deployment of broadband service to all Americans. It is not, and should not be, to push regulation toward some abstract but flawed notion of parity for parity's sake. The competitive and regulatory frameworks applicable to providers of broadband services -- such as cable operators and telephone companies -- in their core businesses, are very different due to historical differences in their development, particularly with respect to financing and licensing. In light of these differences, any discussion of regulatory parity must take into account the entire context of regulation at the Federal, State and local level, and entail a thorough assessment of whether pursuing such abstract goals will indeed foster the kind of widespread deployment that has resulted from the current regulatory framework.

- **Cablevision's Success in Deployment Is Evidence that Local Regulation and Forced Access are Not Necessary to Achieve the Goal of Widespread Availability of Affordable Broadband Service**

While the Commission has continued to maintain its "hands-off" regulatory treatment of cable broadband services, the potential for local franchising authorities to impose burdensome, piecemeal regulation on broadband cable modem service remains. Shaped by market forces rather than local regulatory requirements, Cablevision's high-speed Internet service is now the most highly penetrated broadband service in the nation, demonstrating that the absence of regulation can and will serve consumer welfare. Nevertheless, local governments continue to propose regulations -- from billing rules, collections requirements, speed warranties, customer service requirements, local privacy

rules, filing and notice provisions, pricing and promotional requirements as well as additional taxes and fees – that would form a patchwork of unmanageable rules that inevitably will raise costs and slow deployment.

Complying with this hodgepodge of local regulation would likely require modifications to billing systems, customer service practices, training and protocols, and product offering categories that would not necessarily reflect or satisfy customer demand. Without apparent benefit and with high attendant costs, local regulation of broadband cannot be justified and will inevitably impair deployment and undercut the Commission's primary policy objectives.

I. THE COMMISSION'S HANDS-OFF REGULATORY APPROACH HAS FACILITATED CABLEVISION'S RAPID DEPLOYMENT OF OPTIMUM ONLINE AND OTHER BROADBAND OFFERINGS

The Commission's policy of "vigilant restraint" has permitted the dynamic market for broadband services to flourish. To succeed in this market, Cablevision's Optimum Online is constantly readjusted to meet competitors' offerings, consumers' changing tastes and trends, and changes in how people use broadband technology and services.^{2/}

Cablevision's deployment of broadband is driven by the market – not regulation -- and continues to expand. Optimum Online has the highest market penetration rate of any

^{2/} Cablevision's agility in this dynamic marketplace has been critical to the success of Optimum Online, which consistently ranks as one of the fastest and highest rate residential Internet services in the nation, connecting subscribers at a downstream rate of 10 Mbps and an upstream 1 Mbps -- up to 100 times faster than dial-up, and up to four times faster than DSL. See "The Fastest Broadband ISPs," *DSLReports* (visited June 10, 2002), available at <<http://www.dslreports.com>>; see also "Optimum Online Announces New Internet Security Offering for High-Speed Internet Customers," *PR NewsWire* (May 2, 2002) at 3; *Cablevision's Q1-2002 Optimum Online Earnings Release Information* (March 31, 2002) at 1 ("Q1-2002 Release").

cable Internet service in the country, with an overall penetration rate of 18% where available,^{3/} and reaching 29 percent in Long Island and 22 percent in Connecticut.^{4/} It is available to nearly three million homes, or 69 percent of the company's potential customer base, and has over 560,000 subscribers.^{5/} Upon completion of the planned company-wide cable plant upgrade in 2003, virtually all of Cablevision's potential subscriber base will have access to Optimum Online.^{6/}

Optimum Online also has been recognized as the leader in meeting customers' expectations. In a recent survey, Optimum Online ranked number one in customer satisfaction among cable broadband providers.^{7/} As evidenced by the recent customer comment excerpts attached hereto as Exhibit 2, the customer service and technical support provided by Cablevision to Optimum Online customers has earned special praise from subscribers.^{8/} Customer surveys show that Optimum Online customers are

^{3/} See *Q1-2002 Release* at 1; see also "Optimum Online Announces New Internet Security Offering for High-Speed Internet Customers," *PR NewsWire* (May 2, 2002) at 3; Jim Barthold, "Cablevision Business Sparks Revenue Growth," *Telephony Online* (May 2, 2002), available at <<http://industryclikk.com/microsites/Newsarticle.asp?newsarticleid=314134&srid=1-164&insta>> (reporting that Cablevision's online service penetration rates rose to 18% from 13% a year ago).

^{4/} *Q1-2002 Release* at 1.

^{5/} See *Cablevision Systems Corporation's Annual Report to Stockholders* at 4 (April 10, 2002) ("Annual Report") (reporting that Optimum Online is available to 2.9 million homes, or roughly 69 percent of the 4.3 million homes passed by Cablevision's cable service).

^{6/} *Id.*

^{7/} See "The Good, the Bad and the Ugly: The Best ISPs," *DSLReports* (June 9, 2002), available at <http://www.dslreports.com/gbu> (a copy of the survey is attached as Exhibit 1). See also Edward C. Baig, "Which Broadband Flavor Suits You?," *USA Today* (Nov. 12, 2001), available at <<http://www.usatoday.com/life/cyber/bonus>>.

^{8/} See Exhibit 2.

“extremely satisfied,”^{9/} rank the service “second to none,”^{10/} and marvel at the ease with which they can subscribe to the service.^{11/} Cablevision also has successfully developed user-friendly self-installation kits that speed service deployment and lower up-front costs to consumers.

Optimum Online is bridging the so-called “digital divide” in Cablevision’s service areas. A broad cross-section of Cablevision's customers subscribe to the service. Cablevision has deployed cable Internet service to tens of thousands of homes in low-income neighborhoods in cities such as Newark, NJ, Bridgeport, CT, Elizabeth, NJ and Norwalk CT, and is in the process of rolling out the service to all subscribers in Brooklyn and The Bronx as it completes its upgrades in those areas.

The rapid roll-out of Optimum Online – and the uniformly strong response to this new offering demonstrated throughout Cablevision’s service areas – was done *without* the overhang of local, piecemeal service regulation, and was greatly facilitated by the deregulatory environment established by the Commission for cable broadband services.

II. THE COMMISSION SHOULD REFRAIN FROM IMPOSING NEW REGULATIONS ON CABLE INTERNET SERVICE PROVIDERS

A. The Commission Should Not Impose Forced Access Regulations

The Commission has an admirable and successful record of resisting attempts to impose “forced access” regulations on the dynamic market for high-speed broadband Internet services. Instead, the Commission consistently and correctly has touted the

^{9/} *Cablevision Customer Satisfaction Survey*, Marketing and Planning Systems (July 2001).

^{10/} Brad Grimes, “Ditch Your Dial-Up,” *PC World* (Feb. 2002), *available at* <<http://www.pcworld.com/resource/printable/article/0,aid,73865,00.asp>>.

^{11/} See Todd Spangler, “Crossing the Broadband Divide,” *PC Magazine* (Feb. 12, 2002) at 92.

superiority of market forces over government regulation in the fast-changing broadband services market.^{12/} This approach has yielded a growing market with constantly improving products that meet consumer needs.

Cablevision's Optimum Online is an open system. Any customer can access the services of any ISP; in fact, our customers can and do reconfigure their Optimum Online home page to that of their preferred ISP – including AOL – and can access all Internet content without any restriction whatever. Moreover, Cablevision is working to assess partnerships with ISPs and other arrangements that make sense in the marketplace. Put simply, customer access to ISPs or online content is not an issue. Consequently, any claim that forced access is needed to solve a “problem” with limited access is misguided, and such “remedies” are inappropriate.

Government rules mandating that cable operators enter into business arrangements with ISPs could seriously set back investment in, and deployment and development of, broadband technology. There are several practical reasons why imposition of such rules would not only disserve consumers, but also frustrate the Commission's broadband goals:

First, the Commission wisely has turned to the market to permit cable operators and ISPs to forge mutually beneficial relationships. Cable operators continue to explore

^{12/} See e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, 2421 ¶ 42 (rel. Feb. 21, 1999); *id.* at 2449 ¶ 101. See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, 15 FCC Rcd 20931, 21004 ¶ 246 (rel. Aug. 21, 2000); *Broadband Today*, Cable Service Bureau, Federal Communications Commission, (1999) at 42-44.

and develop “value-added” strategic partnerships with independent ISPs. To the extent that these partnerships yield increased consumer value, increased business success, or favorable economics, they will – as a matter of good business sense – be adopted by the marketplace.

Second, any regulation that forces a commercial relationship between cable broadband providers and ISPs would be incapable of keeping pace with a dynamic market in consumer tastes, uses, and technology or the volatile ancillary financial, equipment, and content markets. Relationships between vendors, suppliers, partners, and affiliates are flexible, and change shape to reflect changing environments. Nowhere is this more true than in the world of broadband – where what was considered “high-speed” only several years ago is now antiquated, where “add-on” services like email, web hosting, Virtual Private Networking (VPNs), static IP addressing, and voice and video services – all with heavy interdependencies between the network architecture, CPE, the Internet services, routing, hosting, and the related services – are continually evolving. Any attempt to impose a static rule that imposes one proponent’s idea of “how the market should be” may divert resources toward meeting regulatory requirements instead of market demands and fail to take account of significant new developments.

Third, regulation of market-based relationships is a slippery slope. A government rule mandating access to cable network infrastructure for unaffiliated ISPs inevitably would spur forced access proponents to urge the Commission to adopt detailed price regulation, negotiating rules, cost studies, separation rules, and similar inquiries. Market participants forced by regulation, rather than mutual interest, to reach an agreement, almost invariably invite further government intervention.

The cable industry has invested heavily to bring the fruits of broadband and high tech services to Americans. The industry has spent more than 60 billion dollars upgrading network infrastructure within the last 5 years.^{13/} Cablevision itself has invested more than 3 billion dollars rebuilding its service infrastructure to enable the company to provide its subscribers with a full slate of next-generation broadband services. Due to these substantial investments, cable operators are under extraordinary pressure from investors to demonstrate a return on their capital.^{14/} Imposing new regulations that increase costs and slow deployment would aggravate the difficulties associated with the decline in cable valuations, and could jeopardize further the ability of cable companies to raise capital, continue upgrading their networks, and roll-out new services.

In short, there is little reason or benefit to discarding or modifying the Commission's policy of "vigilant restraint,"^{15/} which has met with considerable success, and has directly resulted in a much faster and broader roll-out of new broadband services to consumers.

B. There is No Legal Authority To Support Proponents' Demands to Impose New Forced Access Requirements on Cable Operators.

^{13/} See *CableFax Daily*, "Industry Perspective," May 6, 2002.

^{14/} See "'Interactive' Isn't a Word Cable Customers are Interested In," *New York Times*, May 13, 2002 at C4 ("The cable television industry has invested about \$50 billion of investors' money over the last five years to upgrade cable networks to deliver digital services. Those investors now want to see serious returns"); "Adelphia Asset Sales Could Lift Cable Stocks," *The Street.com* (May 27, 2002), available at <<http://www.theStreet.com>> ("Cable operators haven't been shy about borrowing to plow money into infrastructure upgrades and the like, but investors are now tapping their feet waiting for returns").

^{15/} See *Broadband Today*, *supra*, at 15 ("the Commission has adopted a policy of vigilant restraint refraining from mandating "open access" at this time").

There continues to be no sound policy or legal basis for the assertion of “forced access” requirements on cable operators. As NCTA points out in its comments, nothing in Title VI authorizes Commission regulation of cable-provided information services, and Sections 230 and 706 of the Communications Act are mandates not to regulate Internet and advanced services.^{16/} In the Telecommunications Act of 1996, Congress carefully and specifically delineated the type and scope of access and interconnection requirements imposed upon facilities-based providers of communications services. Nothing in that Act or the Communications Act obligates cable operators to share network capacity with third-party ISPs.^{17/}

Apart from the lack of any statutory basis for imposing forced access obligations, such rules also would contravene cable operator constitutional rights. It is well established that cable programmers and cable operators “engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment.”^{18/} These speech rights also are fully implicated when operators provide cable modem service. In *Comcast Cablevision of Broward County, Inc. v. Broward County*, a Federal district court held specifically that a forced access requirement violates cable operators’ First Amendment rights.^{19/} The court found that because the burdens on cable operator speech rights imposed by forced access are aimed at preventing

^{16/} See Comments of the National Cable and Telecommunications Association, GN Docket No. 00-185, CS Docket No. 02-52 (filed June 17, 2002), Section I.

^{17/} See 47 U.S.C. § 251.

^{18/} *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (“the activities in which [a cable operator] ... engage[s] plainly implicate First Amendment interests.”).

^{19/} 124 F. Supp. 2d 685, 692-93 (S.D. Fla. 2000).

“conjectural” rather than “real” harm, the ordinance could not withstand constitutional scrutiny.^{20/}

Forced access requirements also raise Fifth Amendment concerns. By forcing cable operators to surrender involuntarily a portion of their network capacity to unaffiliated ISPs, such requirements directly interfere with cable operators’ exclusive use of their property.^{21/} The serious statutory and constitutional infirmities associated with forced access requirements strongly militate against their imposition by the Commission.

C. The Commission Should Not Allow Incomplete Notions of “Regulatory Parity” to Drive its Policy Regarding Cable Broadband Services

The Commission should not be swayed by incomplete notions of parity advanced by the ILECs. With respect to cable Internet access service, the ILECs typically have premised their demands for “regulatory parity” on only a review of Federal regulation. They proffer a cribbed, one-sided view of parity that would have the Commission focus only on a discrete aspect of the regulatory framework applicable to cable operators and telephone companies in order to advance the ILEC’s parochial agenda.

The business, policy and legal issues that have spawned the different competitive dynamics and regulatory frameworks applicable in the cable and telephone businesses are far more complex than the ILECs acknowledge, notwithstanding their glib appeals to parity.^{22/} While cable and telephone companies are regulated differently at the Federal

^{20/} *Id.* at 697-98.

^{21/} *See Keystone Bituminous Coal Ass’n v. Duncan*, 771 F.2d 707, 712 (3d Cir.), *aff’d*, 480 U.S. 470, 488 (1987).

^{22/} *See e.g. In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-333, Comments of the New York State Department of Public Service, May 14, 2002, at 3, n.3 (“There are historical

level — causing phone companies to complain that they are over-burdened — cable companies have local obligations that are far more exhausting and completely foreign to phone companies. In addition, other regulatory requirements imposed upon cable operators — such as must-carry, program access, rate regulation, technical standards, privacy requirements, restrictions on horizontal ownership -- are likewise ignored in the ILEC appeals to "parity." Saddling cable operators with new regulatory requirements based upon distorted and one-sided notions of parity will not promote the Congressional and Commission goal of accelerating deployment of broadband services

III. LOCAL GOVERNMENT EFFORTS TO IMPOSE FRANCHISING AND FEE REQUIREMENTS ON CABLE INTERNET SERVICE ARE BECOMING INCREASINGLY PREVALENT

The success of the Commission's hands-off policy toward cable Internet service is threatened by additional and intrusive local regulation of cable Internet service. Thus far, the uncertainty over the proper regulatory classification of cable Internet service has forestalled many local governments from imposing local franchising and fee requirements on Optimum Online. Free of local regulatory requirements, Cablevision was able to roll out Optimum Online faster and more widely than would otherwise have been the case. There are ominous signs, however, that this hiatus from local regulation of Optimum Online could come to an end unless the Commission reaffirms the primacy of the Federal "hands-off" policy, which has been instrumental in expediting the roll-out of broadband services across the country.

differences that permit the treatment of cable companies differently than telephone companies. Cable has never been classified as common carriage and unlike the public switched network, which has been funded through rates, the cable industry developed through private sector risk capital").

A. Many Local Governments Are Intent on Subjecting Cable Internet Service to a Full Panoply of Local Franchise and Fee Requirements

The Commission's decision to classify cable Internet service as an information service has prompted some local governments to raise questions about whether Cablevision has the authority to provide Optimum Online at all in the absence of new regulatory approval – and new fee obligations – granted by LFAs. Many local governments have suggested that there are alternative bases – apart from their cable franchising authority – for subjecting Optimum Online to franchising and fee requirements.

In Cablevision's service area, local governments are renewing efforts to impose burdensome franchising and fee requirements, including demands that Cablevision:

- Guarantee certain delivery speeds for Optimum Online;
- Acquiesce to detailed and often-conflicting privacy policies;
- Agree to certain billing rules more appropriately tailored to video services;
- Provide certain “hacking” warranties, firewall services and free software;
- Build its network based on certain static views of available and appropriate technology;
- Provide technology guarantees to one or more communities based on that communities' unilateral assessment of consumer needs or interests;
- Meet specific, government-imposed network architecture requirements, such as limiting Optimum Online's node sizes to 500 homes
- Offer Most Favored Nation (MFN) guarantees that ensure that local residents will have “comparable technology, product, services, and benefits, including, but not limited to those related to cable modems and Internet access, which are provided by the Franchisee or its parent, affiliate or subsidiary to any other community;”
- Pay a separate franchise fee of up to 5% or more of gross revenues from Optimum Online, regardless of the fact that the right-of-way is not impacted by the delivery of this service to consumers.

Cablevision has worked with a number of local governments in connection with the rollout of its Optimum Online service in an effort to minimize the imposition of these regulations, but many local franchising authorities continue to explore opportunities to subject cable broadband services to these types of requirements.

B. The Imposition of Local Regulatory Requirements On Cable Internet Service Will Thwart Accomplishment of the Commission's Broadband Policy Goals

Allowing local governments to unilaterally impose, via a local franchising process, the type of requirements noted here would halt, if not reverse, the progress being made on Congress and the Commission's broadband policy goals.

First, the patchwork of conflicting obligations that would arise from local regulation of cable Internet services will slow broadband deployment and create substantial operational problems. For example:

- Local billing rules and regulations would require Cablevision to develop new, balkanized billing systems capable of complying with the requirements of over 400 local jurisdictions, ranging in size from less than 100 to more than 120,000
- Customer service representatives would have to be trained – town by town, city by city – to record customer service questions, complaints or inquiries to comply with local reporting rules, and would have to be trained to assist in provisioning services in a manner dictated by local rule rather than by customer demands.
- Privacy rules would have to respond not to the changing and increasing demand of consumers for security and privacy, but to the local rule imposed by a town board or cable commission.

Second, the network architecture and complex technical issues attendant to delivering high-speed Internet service are not fruitful areas for regulation by local

governments. It would be wholly counterproductive to permit, for example, local governments to begin regulating downstream and upstream bit rates for cable Internet service. Likewise, there is little benefit to allowing localities to dictate node sizes, network architecture, or “build outs” to cable operators.

Third, new local franchising and fee requirements can only increase the costs of providing cable Internet service and raise prices paid by consumers. Franchise fees and other costly regulation will raise cable Internet service prices, disadvantage cable operators vis-à-vis their competitors, and hamper potential subscribers from purchasing cable Internet service. And the imposition of new price increases on high-speed Internet services would be particularly inopportune now, as such price increases will slow the penetration of these services that cable operators depend on to satisfy an increasingly skeptical financial marketplace.

Fourth, new local franchising and fee requirements on cable Internet service would undermine, rather than promote, parity between broadband providers. Cable’s high-speed Internet access offerings face strong and intensifying competition from DSL and other broadband service (wireline, wireless and satellite) providers – none of whom are presently subject to local franchising and fee requirements in their core businesses. Compounding this regulatory disparity by imposing local franchising and fee obligations only on high-speed Internet service provided by cable operators would be inequitable and counterproductive – particularly since the very competition that cable faces from other broadband service providers obviates such regulation in the first place.

IV. THE COMMISSION SHOULD AFFIRM THAT LOCAL GOVERNMENT REGULATION OF CABLE INTERNET SERVICE CONTRAVENES CURRENT LAW AND FEDERAL BROADBAND SERVICE POLICIES

The cable network facilities and equipment deployed in public rights-of-way that are used to provide cable Internet service already are subject to regulation through the cable franchising process, and cable operators already compensate local governments for use of those public rights-of-way by paying franchise fees on cable service revenues.

The provision of cable Internet service over cable facilities does not impose any additional burden on local rights-of-way or costs on municipalities. There is no need to impose a second franchise requirement on cable operators simply because they provide Internet access service over cable facilities already in public rights-of-way.

Further, cable Internet service already faces strong competition from DSL offerings furnished by telephone companies, and from broadband services offered by wireless and satellite providers.^{23/} The vigorously competitive marketplace can address the customer service, speed, and privacy issues that some local governments have cited as justification for regulating cable Internet service.

^{23/} See “Competition in the Video Marketplace is Here to Stay: Over 21 Million Consumers Now Subscribe to Cable's Competitors,” NCTA, *available at*, <<http://www.ncta.com/legislative/legAffairs.cfm?legRegID=19>> (visited June 14, 2002) (noting that DSL subscribership reached 3.5 million last year and was available to 51 million homes); “DIRECTWAY Subscribers Break 100,000 Mark,” Press Release, Jan. 9, 2002, *available at* <<http://www.hns.com/default.asp?CurrentPath=corporate/news/pr/pr9999487460002.htm>>; *see also Inquiry Concerning the Deployment of Adv. Telecomm. Capability to All Americans in a Reasonable & Timely Fashion*, CC Docket No. 98-146, Third Report, 17 FCC Rcd. 2844, 2874 ¶ 72 (2002) (stating that fixed wireless systems reached 55% of the population in the fourth quarter of last year and analysts expect the service will be available to 90 percent of the population by 2004).

Driven by the prospect of a new source of revenues, however, local governments undoubtedly will continue to pursue regulation of cable Internet service.^{24/} In order to ensure continued broadband service growth and development, the Commission should establish a national policy precluding local government regulation of cable Internet service.

Cablevision agrees with the tentative conclusion set forth in the *Notice* that several provisions of Title VI preclude LFAs from relying upon their cable franchising authority as a source of regulatory jurisdiction over high-speed Internet and other information services provided over cable systems by cable operators.^{25/}

It would also be appropriate for the Commission to clarify that there is no source of authority – independent of Title VI -- in State or local law that would permit regulation of cable Internet service, due to the Federal government’s “occupation of the field” of Internet access services furnished over cable systems specifically, and information

^{24/} See “Cities Contest Cable Decision to Stop Modem Franchise Fees,” *Communications Daily* (April 18, 2002) (noting that cities continue to argue that they have the right to impose franchise fees on cable modem service); “Local Governments Challenge FCC Ruling on Cable Modems,” *TR Daily* (May 14, 2002) (quoting National Association of Counties official bemoaning loss of cable modem revenue from FCC classification decision).

^{25/} *Notice* at ¶¶ 102, 105. Title VI of the Communications Act provides that franchising authorities “may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title,” 47 U.S.C. § 544(a), and that “the franchising authority. . . may not . . . establish requirements for video programming or other information services.” 47 U.S.C. § 544(b)(1). Title VI provides that all cable franchises must be construed to permit the placement and use of cable system facilities in the public rights-of-way, 47 U.S.C. § 541(a)(2), and does not empower local franchising authorities to impose separate franchise requirements on a cable operator’s additional uses of cable facilities lawfully deployed in public rights-of-way. It further provides that local franchising authorities may impose franchise fees only upon cable operator revenues “derived from the operation of the cable system to provide cable service.” 47 U.S.C. § 542(b).

services generally.^{26/} Local regulation of “information services” is clearly inconsistent with long-standing FCC policy to preclude unnecessary regulation of such services.^{27/} The FCC’s policy of deregulation was designed to afford enhanced service providers “tremendous flexibility” so that there would be “no restriction on the types of services they may provide, except those imposed by the demands of their customers.”^{28/}

Indeed, the FCC has steadfastly avoided treating information services providers as telecommunications carriers, thereby precluding the imposition of state regulation and “market access restrictions” on ISPs.^{29/} The FCC has specifically noted that “[s]uch a result would inhibit growth of these procompetitive services, to the detriment of

^{26/} *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980) (“*Computer II*”) (asserting jurisdiction asserted to regulate all rates, terms, and conditions of information services), *recon.*, 84 FCC 2d 50 (1980) (“*Computer II Reconsideration Order*), *recon.*, 88 FCC 2d 512 (1981), *aff’d sub nom.*, *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (affirming Commission preemption of state regulation of information services); *Computer III Remand Proceedings: Bell Operating Company Safeguards & Tier I Local Exchange Company Safeguards*, 6 FCC Rcd. 7571 (1991)(preempting state rules that “essentially negat[e] the FCC’s goal of allowing integrated provision of enhanced and basic service”), *recon. dismissed in part*, 11 FCC Rcd. 12513 (1996), *vacated in part & remanded sub nom.*, *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) (upholding preemption of state network disclosure rules).

^{27/} *See, e.g., In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. 11501 (1998) (“*Universal Service Report*”) at ¶ 46 (“An approach in which a broad range of information service providers are . . . presumptively subject to Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry”); *Computer II, supra*, at ¶ 114 (“We believe that, consistent with our overall statutory mandate, enhanced services should not be regulated under the Act”); “The FCC and the Unregulation of the Internet,” OPP Working Paper No. 31 (July 1999). *See also AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) (“‘information services – the codified term for what the FCC first called ‘enhanced services’ – have never been subject to regulation under the Communications Act”); *Howard v. America Online* 208 F.3d 741, 752-53 (9th Cir. 2000).

^{28/} *Computer II, supra*, at ¶ 117.

^{29/} *See Universal Service Report* at ¶ 48.

consumers in the United States and abroad.”^{30/} Local regulation of cable operator entry into the business of providing Internet access would constitute the type of “market access restrictions” the FCC has sought to avoid imposing upon ISPs.^{31/}

President Bush recently reaffirmed the importance of keeping the Internet free of taxes and unnecessary regulation.^{32/} Congress likewise has clearly signalled that local governments may not regulate access to the Internet. In the Telecommunications Act of 1996, Congress established that “the policy of the United States” is “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive services, unfettered by Federal and State regulation.”^{33/} The adoption of an explicit Federal policy regarding Internet regulation clearly constrains the exercise of local authority over Internet businesses and services. The deregulatory thrust of that Federal policy militates against imposing regulatory burdens on cable Internet service.^{34/}

Given the Commission’s concern that regulation could significantly impede deployment of broadband services, a reaffirmation of the primacy of the Federal policy of “vigilant restraint” and a clear statement that precludes local regulation of cable Internet

^{30/} *Id.*

^{31/} *See Computer II* at ¶ 116 (noting that deregulation of enhanced services avoids “inconsistent regulatory scheme[s]” and ensures that “administrative processes [are not] interjected between technology and its marketplace applications”).

^{32/} *See* “Broadband Politics: Bush Touts Powell Plan,” *CableFAX Daily*, June 14, 2002, at 1.

^{33/} 47 U.S.C. § 230(b)(2). Optimum Online is clearly an interactive computer service for purposes of Section 230. *See id.* (defining interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet”).

^{34/} *See Howard v. America Online* 208 F.3d at 752-53 (noting that FCC interpretation exempting AOL from regulation under Title II of the Communications Act “meets th[e] policy goal” of Section 230(b)(2)).

services would further the national goal of widespread deployment of broadband technology and services.

CONCLUSION

For the foregoing reasons, the Commission should refrain from imposing new regulations on cable Internet service and preclude local governments from imposing franchising and fee requirements on high-speed Internet services offered over cable systems.

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CERTIFICATE OF SERVICE

I, Robert G. Kidwell, do hereby certify that on this 17th day of June, 2002, copies of the foregoing Comments of Cablevision Systems Corporation were served on the following persons in the indicated manner:

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